

NORTH DAKOTA
PUBLIC SERVICE COMMISSION
CONTRACT PROCEDURES

Adopted January 12, 1981

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Adopted January 12, 1981
5th Revision June 1995

I. PSC EMPLOYEE AND PUBLIC CONTRACTOR CODE OF CONDUCT

A. General Rule

No Commissioner, Commission employee, or agent will participate in selection or in the award or administration of a contract if a conflict of interest, real or apparent, would be involved. A conflict would arise when the Commissioner, the employee or agent, any member of his immediate family, his partner, or an organization which employs or is about to employ the Commissioner, Commission employee, his immediate family member, or partner has financial or other interest in the firm selected for award.

B. Gifts

Commission contractors and subcontractors and their employees or agents will not directly or indirectly offer nor will Commissioners or employees directly or indirectly accept or solicit any gift, gratuity, entertainment, favor, loan, or any other thing of monetary value which might reasonably be interpreted as intended to secure a contract or favorable treatment in award, amendment, or administration of a contract.

During an audit or inspection, Commissioners, employees, or agents will neither solicit nor accept gratuities, food, favors, or anything of monetary value from a bidder, contractor, or party to a subagreement.

No political contribution may be offered, solicited, or accepted for the purpose of affecting the award, amendment, or administration of a contract.

II. CHECK LIST FOR NEGOTIATING CONTRACTS

1. Is there a clear and accurate description (in unambiguous terms) of the services to be performed?
2. When will the work begin? When will it be completed? The dates should be specified in the contract.
3. Will periodic progress reports be submitted (weekly, monthly, quarterly)?
4. What are the deliverables (written reports, statistical tables, oral testimony, etc)? Draft form or final?
5. Who has ownership of the materials produced or purchased under the contract?
6. Is there a cost/price analysis to determine if the cost is fair and reasonable?
7. What is the method of compensation (cash advance, fixed fee, unit price, cost reimbursable)?
8. What expenses other than compensation for services will be allowed?
9. Will the contractor be allowed to contract out (sub-contract) part of the work? If so, identify options 1 through 8 of this section that will be

allowable under sub-contracts.

III. STANDARD CONTRACT PROVISIONS

Reference: N.D.C.C. 43-07-01

A. All Contracts

1. **Remedies.** Except as otherwise provided in this contract, all claims, counterclaims, disputes, and other matters in question between the Commission and the contractor arising out of or relating to this agreement will be decided by arbitration if the parties hereto mutually agree, or in a court of competent jurisdiction within North Dakota.
2. **Termination For Default; Damages For Delay; Time Extensions**
 - a. If the contractor refuses or fails to prosecute the work, or any separable part with diligence to insure its completion within the time specified in the contract, or any extension of time, or fails to complete the work within that time, the Commission may, by written notice to the contractor, terminate his right to proceed with the work or that part of the work that has been delayed. In that event, the Commission may take over and prosecute the work to completion, by contract or otherwise, and in completing the work may take possession of and use necessary materials, appliances and plant as may be on the work site. Whether or not the contractor's right to proceed with the work is terminated, he and his sureties will be liable for any damage to the

Commission resulting from his refusal or failure to complete the work within the specified time.

- b. If fixed and agreed liquidated damages are provided in the contract and if the Commission terminates the contractor's right to proceed, the resulting damage will consist of the liquidated damages. The resulting damages will be the liquidated damages for the reasonable time required for final completion of the work together with any increased costs incurred by the Commission in completing the work.
- c. If fixed and agreed liquidated damages are provided in the contract and if the Commission does not terminate the contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.
- d. The contractor's right to proceed will not be terminated nor the contractor charged with resulting damage if:
 - 1) The delay in the completion of the work arises from causes other than normal weather beyond the control and without the fault or negligence of the contractor, including acts of God, acts of a public enemy, acts of the Commission in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Commission, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe

weather, or delays of subcontractors or suppliers arising from causes other than normal weather beyond the control and without the fault or negligence of both the contractor and such subcontractors or suppliers, and

- 2) The contractor, within 10 days from the beginning of the delay (unless the Commission grants additional time before the date of final payment under the contract), will notify the Commission in writing of the causes of delay. The Commission will ascertain the facts and the extent of delay and extend the time for completing the work when in its judgment the findings of fact justify an extension, and its findings of fact will be final and conclusive on the parties, subject only to appeal as provided in the "Remedies" clause of this contract.

- e. If, after notice of termination of the contractor's right to proceed under the provisions of this clause, the Commission determines that the contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties will, if the contract contains a clause providing for termination for convenience of the Commission, be the same as if the notice of termination had been issued under the termination for convenience clause. If, in the foregoing circumstances, this

contract does not contain a clause providing for termination for convenience of the Commission, the contract will be equitably adjusted to compensate for the termination and the contract modified accordingly; failure to agree to adjustment will be subject to the "Remedies" clause of this contract.

- f. The rights and remedies of the Commission provided in this clause are in addition to any other rights and remedies provided by law or under this contract.
- g. As used in paragraph d, subparagraph 1 of this clause, the term "subcontractors or suppliers" means subcontractors or suppliers at any tier.

3. Termination for Convenience

- a. The performance of work under this contract may be terminated by the Commission by this clause in whole, or in part, whenever the Commission determines that termination is in the best interest of the state. Termination will be affected by delivery to the contractor of a notice of termination specifying the extent performance of work under the contract is terminated, and the date upon which such termination becomes effective.
- b. After receipt of a notice of termination, and except as otherwise directed by the Commission, the contractor will:
 - 1) Stop work under the contract on the date and to the extent specified in the notice of termination;

- 2) Place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of that portion of the work under the contract not terminated;
- 3) Terminate all orders and subcontracts to the extent they relate to the performance of work terminated by the notice of termination;
- 4) Assign to the Commission, in the manner, at the times, and to the extent directed by the Commission, all of the right, title, and interest of the contractor under the orders and subcontracts so terminated, in which case the Commission will have the right, in its discretion, to settle or pay any or all claims arising out of the termination of orders and subcontracts;
- 5) Settle all outstanding liabilities and all claims arising out of termination of orders and subcontracts, with the approval or ratification of the Commission to the extent it may require, which approval or ratification will be final for all the purposes of this clause;
- 6) Transfer title to the Commission, and deliver in the manner, at the times, and to the extent directed by the Commission:

- a) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated; and
 - b) The completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Commission.
- 7) Use his best efforts to sell, in the manner, at the times, to the extent and at the price or prices directed or authorized by the Commission, any property of the types referred to in subparagraph 6 above provided, however, that the contractor:
- a) Will not be required to extend credit to any purchaser; and
 - b) May acquire any such property under the conditions prescribed and at a price or prices approved by the Commission; and provided further that the proceeds of any such transfer of disposition will be applied in reduction of any payments to be made by the Commission to the contractor under this contract or will otherwise be credited to the price or cost of the

work covered by this contract or paid in such other manner as the Commission may direct;

- 8) Complete performance of the work not terminated by the notice of termination; and
 - 9) Take action as may be necessary, or as the Commission may direct, for the protection and preservation of the property related to this contract which is in the possession of the contractor and in which the Commission has or may acquire an interest.
- c. After receipt of a notice of termination, the contractor will submit to the Commission his termination claim, in the form and with the certification prescribed by the Commission. Such claim will be submitted promptly but no event later than one year from the effective date of termination, unless a written extension is granted by the Commission upon written request of the contractor made within the one-year period. However, if the Commission determines that the facts justify, it may receive and act upon any termination claim within the time allowed; the Commission may determine, on the basis of information available to it, the amount due the contractor by reason of the termination and will then pay to the contractor the amount determined.
- d. Subject to the provisions of paragraph c of this clause, the contractor and the Commission may agree upon the whole or any

part of the amount to be paid to the contractor by reason of the total or partial termination of work under this clause, which amount may include a reasonable allowance for profit on work done; provided that the agreed amount, exclusive of settlement costs, will not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract will be amended accordingly, and the contractor will be paid the agreed amount. Nothing in paragraph e of this clause, prescribing the amount to be paid to the contractor and the Commission to agree upon the whole amount to be paid to the contractor by reason of the termination of work under this clause, will be deemed to limit, restrict, or otherwise determine or affect the amount which may be agreed upon to be paid to the contractor under this paragraph.

- e. In the event of the failure of the contractor and the Commission to agree as provided in paragraph d upon the whole amount to be paid to the contractor by reason of the termination of work under this clause, the Commission will determine, on the basis of information available to it, the amount due to the contractor by reason of the termination and will pay to the contractor the amounts determined as follows:

- 1) With respect to all contract work performed prior to the effective date of the notice of termination, the total (without duplication of any items) of:
 - a) The cost of the work;
 - b) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders as provided in paragraph b, subparagraph 5 of this clause, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the notice of termination of work under this contract, which amounts will be included in the cost on account of which payment is made under this subparagraph, part a above; and
 - c) A sum, as profit on part a above, determined by the Commission to be fair and reasonable; provided, however, that if it appears that the contractor would have sustained a loss on the entire contract had it been completed, no profit will be included or allowed under this part c and an appropriate adjustment will be made reducing the amount of the settlement to reflect the indicated rate of loss; and

- 2) The reasonable cost of the preservation and protection of property incurred under paragraph b, subparagraph 9 and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the contractor as the result of the termination of work under this contract.

The total sum to be paid to the contractor under subparagraph 1 above will not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the text that the Commission will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to the contractor under subparagraph 1 above, the fair value, as determined by the Commission of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Commission or to a buyer pursuant to paragraph b, subparagraph 7.

- f. The contractor will have the right to dispute under the "Remedies" clause of this contract any determination made by the Commission under paragraph c or e above, except that, if the contractor has failed to submit his claim within the time provided in paragraph c above and has failed to request extension of that

time, he will have no right of appeal. In any case where the Commission has made a determination of the amount due under paragraph c or e above, the Commission will pay to the contractor the following:

- 1) If there is no right of appeal under the contract or if timely appeal has not been taken, the amount so determined by the Commission; or
 - 2) If a "Remedies" proceeding is initiated, the amount finally determined in the "Remedies" proceeding.
- g. In arriving at the amount due the contractor under this clause, there will be deducted:
- 1) All advance or other payments made to the contractor, applicable to the terminated portion of this contract;
 - 2) Any claim which the Commission may have against the contractor in connection with this contract; and
 - 3) The agreed price for, or the proceeds of sale of, any materials, supply or other things kept by the contractor or sold, under the provisions of this clause, and not otherwise recovered by or credited to the Commission.
- h. If the termination is partial, prior to the settlement of the terminated portion of this contract, the contractor may file with the Commission a request in writing for an equitable adjustment of the price specified in the contract on the continued portion of the

contract (the portion not terminated by the notice of termination), and equitable adjustment as may be agreed upon will be made in the price; however, nothing will limit the right of the Commission and the contractor to agree upon the amount to be paid to the contractor for the completion of the continued portion of the contract when the contract does not contain an established contract price for the continued portion.

4. **Labor Standards.** In any contract awarded in excess of \$10,000 and in any subcontract awarded in excess of \$10,000, the contractor and its subcontractors agree to comply with Executive Order 11246 entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60).
5. **Audit; Access to Records**
 - a. The contractor will maintain books, records, documents, and other evidence directly pertinent to performance of work under this contract in accordance with generally accepted accounting principles and practices consistently applied. The federal grantor agency, the Comptroller General of the United States, the United States Department of Labor, and the Commission or any of their authorized representatives will have access to books, records, documents, and other evidence for the purpose of inspection,

audit and copying. The contractor will provide reasonable facilities and assistance for access and inspection.

- b. If this contract is a formally advertised, competitively awarded, fixed price contract, the contractor agrees to make paragraphs a through f of this clause applicable to all negotiated change orders and contract amendments affecting the contract price. In the case of all other types of prime contracts, the contractor agrees to include paragraphs a through f of this clause in all its contracts in excess of \$10,000 and all tier subcontracts in excess of \$10,000 and to make paragraphs a through f of this clause applicable to all change orders under the contract directly related to project performance.
- c. Audits conducted under this provision will be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or auditing agency(ies).
- d. The contractor agrees to the disclosure of all information and reports resulting from access to records under paragraphs a and b above to any of the agencies referred to in paragraph a above, provided that the contractor is afforded the opportunity for an audit exit conference and an opportunity to comment and submit any supporting documentation on the pertinent portions of the draft audit report, and that the final federal grantor agency or

Commission audit report will include written comments of reasonable length, if any, of the contractor.

- e. Records under paragraphs a and b above will be maintained and made available during performance on work under this contract and until three years from the date of final payment for the project. In addition, those records which relate to any dispute appeal under federal grant agreement, or litigation, or the settlement of claims arising out of such performance, or costs or items to which an audit exception has been taken, will be maintained and made available until three years after the date of resolution of the appeal, litigation, claim, or exception.
- f. The right of access conferred by this clause will generally be exercised (with respect to financial records) under the following:
 - 1) Negotiated prime contracts,
 - 2) Negotiated change orders or contract amendments in excess of \$10,000 affecting the price of any formally advertised, competitively awarded, fixed price contract, and
 - 3) Subcontracts or purchase orders under any contract other than a formally advertised, competitively awarded, fixed price contract. However, this right of access will generally not be exercised with respect to a prime contract, subcontract, or purchase order awarded after effective

price competition. However, the right of access may be exercised under any contract or subcontract:

- a) With respect to records pertaining directly to contract performance, including any financial records of the contractor;
- b) If there is any indication that fraud, gross abuse, or corrupt practices may be involved; or
- c) If the contract is terminated for default or for convenience.

6. **Covenant Against Contingent Fees.** The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this warranty, the Commission will have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of the Commission, percentage, brokerage, or contingent fee.

7. **Copyrights and Rights In Data.** The contractor agrees that any plans, drawings, designs, specifications, computer programs (which are substantially paid for with federal grant or state funds), technical

reports, operation manuals, and other work submitted with a proposal or grant application or which are specified to be delivered under this contract or which are developed or produced and paid for under this contract (referred to in this clause as "subject data") are subject to the rights of the Commission to use, duplicate, and disclose the subject data, in whole or in part, in any manner for any purpose whatsoever, and have others do so. If the material is copyrightable, the contractor may copyright the material, subject to the rights in the government; but the Commission and the federal government reserve a royalty-free, non-exclusive, and irrevocable license to reproduce, publish, and use the materials, in whole or in part, and to authorize others to do so. The contractor will include provisions appropriate to effectuate the purposes of this condition in all subcontracts expected to produce copyrightable "subject data".

8. **Prohibition Against Listed Violating Facilities.** (Applicable only to contracts and subcontracts in excess of \$100,000) The contractor agrees to comply with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h)), Section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15), which prohibit the use under non-exempt federal contracts, grants or loans of facilities included on the EPA list of Violating Facilities. This provision requires reporting violations to the federal

grantor agency and to the U.S.E.P.A. Assistant Administrator for Enforcement (EN-329).

9. **Policies Relating to Energy Efficiency.** The contractor agrees to follow mandatory standards and policies related to energy efficiency contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

10. **Changes**

- a. The Commission may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any changes in the work within the general scope of the contract, including changes:
- 1) In the specifications (including drawings and designs);
 - 2) In the method or manner of performance of the work;
 - 3) In the Commission furnished facilities, equipment, materials, services or site; or
 - 4) Directing acceleration in the performance of the work.
- b. Any other written order or an oral order (which in terms as used in this paragraph b will include direction, instruction, interpretation, or determination) from the Commission which causes any change, will be treated as a change order under this clause, provided that the contractor gives the Commission written notice stating the date, circumstances, and source of the order and that the contractor regards the order as a change order.

- c. Except as provided under the "Changes" clause, no order, statement, or conduct of the Commission will be treated as a change or entitle the contractor to an equitable adjustment under the "Changes" clause.
- d. If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment will be made and the contract modified in writing accordingly; provided, however, that except for claims based on defective specifications, no claim for any change under paragraph b above will be allowed for any costs incurred more than 20 days before the contractor gives written notice as required; and provided further that in the case of defective specifications for which the Commission is responsible, the equitable adjustment will include any increased cost reasonably incurred by the contractor in attempting to comply with the defective specifications.
- e. If the contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under paragraph a above or the furnishing of a written notice under paragraph b above, submit to the Commission a written statement setting forth the general nature and monetary extent of the claim, unless this period is

extended by the Commission. The statement of claim may be included in the notice under paragraph b above.

- f. No claim by the contractor for an equitable adjustment under the "Changes" clause will be allowed if asserted after final payment under this contract.

11. Equitable Adjustments

- a. Equitable adjustments will be measured by the cost impact on the contractor. The cost must be allowable, i.e., reasonable, allocable, in accordance with generally accepted accounting principles and cost accounting standards if applicable, and not limited or excluded by contract or procurement provisions.
- b. The basis pricing formula for an equitable adjustment is the difference between the reasonable cost of performing without the change or deletion and the reasonable cost of performing with the change or deletion. The equitable adjustment may not properly be used as an occasion for reducing or increasing the contractor's profit or loss, or for converting a loss to a profit or vice versa, for reasons unrelated to a change or a differing site condition. A contractor who has underestimated his bid or encountered unanticipated expense or inefficiencies may not properly use a change order or differing site conditions as an excuse to reform the contract or to shift his own risks or losses to the Commission. Similarly, the Commission cannot use an

equitable adjustment to avoid the impact of a contractor's unbalanced bid.

12. Suspension of Work

- a. The Commission may order the contractor in writing to suspend all or any part of the work for a period of time as determined to be appropriate for the convenience of the Commission.
- b. If the performance of all or any part of the work is, for an unreasonable period of time, suspended by an act of the Commission in administration of this contract, or by its failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment will be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension and the contract modified in writing accordingly. However, no adjustment will be made under this clause for any suspension to the extent:
 - 1) That performance would have been suspended by any other cause, including the fault or negligence of the contractor, or
 - 2) For which an equitable adjustment is provided for or excluded under any other provision of this contract.
- c. No claim under this clause will be allowed:

- 1) For any costs incurred more than 20 days before the contractor notified the Commission in writing of the new act or failure to act involved (but this requirement will not apply to a claim resulting from a suspension order); and
- 2) Unless the claim in an amount stated, is asserted in writing as soon as practicable after the termination of suspension, but not later than the date of final payment under the contract.

13. **Invoices and Payment.** Unless otherwise specified by the procurement officer or project manager:

- a. Invoices or estimate of project completion will be submitted monthly in a reasonable and detailed form.
- b. Based on the monthly invoice or estimate of project completion, payment will be made monthly to the contractor for services rendered, work done, or material furnished as follows. At least once each calendar month during the continuance of a project, the project manager, contract officer, and procurement officer will meet and receive and consider the invoice or estimates of project completion furnished by the contractor. Payment will be made for such invoice or estimate in an amount of the estimated value of the services, labor and material furnished upon the contract, and of the material upon the site, if any, for use in construction, subject to retentions as follows: ten (10) percent of each

estimate presented until the project is fifty (50) percent completed, with no further retainage on estimates during the continuance of the contract. However, any deliverable items will be submitted prior to payment for the period during which the item is deliverable.

- c. The procurement officer, contract officer, and project manager will pay the amount retained in such amounts and such times as are approved by the Commission, with final payment immediately following completion, close-out and acceptance of the project.

14. **Right of Entry.** The Commission will obtain for the contractor and his appropriate subcontractors any right of entry necessary for performance of the contract. In such cases, the contractor and subcontractors will not enter without right of entry. When exercising the right of entry, the contractor and subcontractors will take reasonable steps to explain their presence to landowners and land occupiers.

15. **Insurance and Indemnity.** The contractor and subcontractors will obtain and keep in force sufficient insurance coverage to protect the state, local political subdivision, all their officers, agents, and employees and all landowners to the project area. The contractor and subcontractor agree to hold the Commission harmless from and against loss, damage, injury, or liability arising directly or indirectly from the negligent acts or omissions of the contractor, contractor's

employees, agents, subcontractors, and their employees and agents. However, the procurement officer may require any offeror, contractor or subcontractor to carry various types of insurance in amounts as specified in the invitation for bid or request for proposal. If a suit is initiated or judgment entered against the Commission, the contractor and subcontractors will indemnify the Commission for any settlements made or judgment satisfied.

16. **Personnel**

- a. The contractor represents that he has, or will secure at his own expense, all personnel required in performing the services under the contract. Such personnel will not be employees of the Commission.
- b. All of the services required under the contract will be performed by the contractor or under his supervision, and all personnel engaged in the work will be fully qualified and will be authorized or permitted under state and local law to perform such services.

17. **Assignability.** The contractor will not assign or transfer any interest in the contract without the prior written consent of the Commission; provided, however, that claims for money due or to become due to the contractor from the Commission may be assigned without such approval. Written notice of any assignment or transfer will be furnished promptly to the Commission.

18. **Officials Not to Benefit.** No members of or delegates to the Congress of the United States of America or federal, state, and local officials or employees will be admitted to any share or part or to any benefit to arise under the contract.
19. **Interest of Contractor.** The contractor covenants that he presently has no interest and will not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under the contract. The contractor further covenants that in the performance of the contract, no person having any such interest will be employed.
20. **Contractor Reports.** For the duration of the contract period, the contractor will file a monthly report with the Commission. Unless otherwise requested by the project manager, the report will be no longer than two typewritten letter-size pages and will describe work progress, problems encountered, and other pertinent information.

B. Construction Contracts

1. **Labor Standards.** The contractor agrees that "construction" work (as defined by the U.S. Secretary of Labor) will be subject to the following labor standards to the extent applicable:
 - a. In any construction contract and subcontract, the contractor or subcontractor will agree to comply with the Copeland "Anti-Kickback" Act (18 USC 874) as supplemented in the U.S. Department of Labor regulations

(29 CFR Part 3). This Act provides that each contractor or subcontractor will be prohibited from inducing by any means any person employed in the construction, completion, or repair of public work to give up any part of the compensation to which he is otherwise entitled.

- b. Provisions of the Fair Labor Standards Act of 1938 as amended apply.

2. Differing Site Conditions

- a. The contractor will promptly, and before such conditions are disturbed, notify the Commission in writing of:
 - 1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract; or
 - 2) Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract. The Commission will promptly investigate the conditions; and if it finds that the conditions do materially differ and cause an increase or decrease in the contractor's cost of or the time required for performance of any part of the work under the contract, whether or not changed as a result of such conditions, an equitable adjustment will be made and the contract modified in writing accordingly.

- b. No claim of the contractor under this clause will be allowed unless the contractor has given the notice required in paragraph a above; provided, however, the time prescribed may be extended by the Commission.
- c. No claim by the contractor for an equitable adjustment under the "Differing Site Conditions" clause will be allowed if asserted after final payment under the contract.

C. Professional Services

- 1. **Warranty.** The professional services will be performed, findings obtained, and reports and maps prepared according to the contract and the generally and currently accepted principles and practices.
- 2. **Reimbursable Expenses.** Unless otherwise specified, photocopies of receipts will accompany monthly invoices for all reimbursable expenses. Reimbursable expenses will be no more than as follows:
 - a. Actual travel expense not to exceed current state rates and only expenses necessary for the execution of the project including:
 - 1) Air fares,
 - 2) Rental vehicles,
 - 3) Highway mileage in company or personal vehicles.
 - b. Actual shipping charges for samples, field test equipment, etc.
 - c. Subsistence (food) and lodging when overnight travel is required at current state rates. Receipts for subsistence are not required.
 - d. Expendable items required for field work.

- e. Actual telephone, telex, photocopying, postage, printing, photographs, or reproduction of reports and drawings.
- f. Actual subcontracted work and special consulting services by others. Employees loaned from affiliate organizations will be involved at rates consistent with equivalent level contractor personnel.
- g. Actual analyses performed by biological, water quality, agronomic, geochemical, and other laboratories will be performed on a unit cost basis.
- h. Actual rental of specialized testing or monitoring equipment required for project execution.
- i. Additional specialized equipment purchased for the project to become the Commission's property upon completion is cost reimbursable. However, such equipment will not be purchased without written Commission approval.

IV. CONTRACT ADMINISTRATION

The procurement officer with the project manager and contract officer maintain a contract administration system insuring that contractors perform in accordance with the terms, conditions and specifications of their contracts or purchase orders.

V. CONTRACTOR CLAIMS

A. **Definition.** A claim is the contractor's written demand to the Commission seeking, as a matter of right, payment, adjustment, or interpretation of contract terms or other relief arising under the contract. A claim must unequivocally state that the contractor demands a decision, not merely advice, discussion, or comment. An invoice is not a claim.

B. **Statement of the Claim**

1. The statement of the claim will contain elements:
 - a. A declaration: "This is a claim by contractor "X" against the North Dakota Public Service Commission."
 - b. A summary paragraph explaining the claim.
 - c. Identification of the relevant contract and contract terms.
 - d. A statement of facts, i.e., events or occurrences that give rise to the claim.
 - e. How the factual events or occurrences adversely affected the contractor's performance. The contractor must prove causation. The contractor will state the extent to which he was at fault.
 - f. Application of the law to the facts.
 - g. Express statement of the relief sought and the calculations used to determine the specific dollar amount or time sought.

- h. Conclusion with a summary of the major elements of the claim and a legal demand for a) appropriate relief and b) a decision from the Commission.
 - i. Contractor certification by sworn affidavit that the claim is filed in good faith and is an accurate and complete statement of fact.
- 2. If the claim is for more than \$10,000, the contractor will provide all actual project costs categorized as follows:
 - a. **Labor.** Each employee will be listed by name along with his responsibilities, hours and wages;
 - b. **Bond, insurance, and taxes.** Premiums paid on bonds and property damage, liability, workmen's compensation, and unemployment insurance will be listed. Social security taxes paid will be listed.
 - c. **Materials.** All materials and all actual material costs for all materials accepted by the project manager and permanently installed in the work will be listed. Transportation charges will be included.
 - d. **Equipment.** All equipment will be identified by manufacturer, model number, capacity, age, date of purchase, and purchase price or actual rental cost. Depreciation, fuel, and maintenance costs for each identified piece of equipment will also be provided.

The actual cost of each equipment item used in the project will be provided.

- e. **Subcontracts.** All subcontracts and subcontractors and actual costs of the subcontracted work to the contractor on the project will be provided.
- f. **Overhead.** All overhead costs attributable to the project will be listed. Calculations will be shown.
- g. **Miscellaneous.** All other actual costs of the project not covered above will be listed.

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VIII. APPENDIX

- A. Sample Close-Out Letter to Contractor
- B. Sample Contract Transmittal Letter
- C. Sample Detailed Budget Sheet for Cost Reimbursable Contracts
- D. Check List for Negotiating Contracts
- E. Public Service Commission Contract Numbering System
- F. Conflict of Interest Disclaimer
- G. Checklist for Work Statement (Specific Provisions) Contracts and Requests for Proposals
- H. Certification of Payment to Employees, Suppliers, Sub-Contractors

APPENDIX A

Sample Close-Out Letter to Contractor

APPENDIX B

Sample Contract Transmittal Letter

APPENDIX C

Sample Detailed Budget Sheet for Cost Reimbursable Contracts

APPENDIX D

Check List for Negotiating Contracts

APPENDIX E

Public Service Commission Contract Numbering System

APPENDIX F

Conflict of Interest Disclaimer

APPENDIX G

Checklist for Work Statement (Specific Provisions) Contracts and Requests
for Proposals

APPENDIX H

Certification of Payment to Employees, Suppliers, Sub-Contractors

